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IN THE

SUPREME COURT OF THE UNITED STATES

No. 865

ATHANASIOS PATSIS, a/k/a THOMAS NICKAS,
Petitioner,

vs.

IMMIGRATION AND NATURALIZATION SERVICE,
Respondent.

PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS OF PETITION

Opinions Below 1
Jurisdiction 2
Question Presented 2
Statutes Involved 3
Statement 3
Federal Jurisdiction Below 6
Argument 6
Conclusion 11

Table of Authorities

CASES:

Fong v. *Immigration and Naturalization Service*, 308 F.2d 191 (9th Cir. 1962) 6, 11

Patsis v. *Immigration and Naturalization Service*, 337 F.2d 733 (8th Cir. 1964) 6, 7, 10

STATUTES INVOLVED:

Immigration and Nationality Act of 1952, 66 Stat. 163 f.f., as amended

Section 241(a) 8, 9

Section 244(a) prior to amendment by Section 4 of the Act of October 24, 1962, 76 Stat. 1247 7

Section 244(a) as amended by Section 4 of the Act of October 24, 1962, 76 Stat. 1247 7

Section 265 8

TABLE OF CONTENTS OF APPENDICES

(attached)

APPENDIX A

Opinions Below:

Eighth Circuit Court of Appeals opinion, in *Patsis v. Immigration and Naturalization Service*, dismissing petition for review 1a

Board of Immigration Appeals Order dismissing appeal dated March 8, 1963 ..... 19a

Special Inquiry Officer's decision dated November 30, 1962 ..... 21a

APPENDIX B

Statutes Involved 1b-11b

IN THE

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No.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit in Athanasios Patsis, a/k/a Thomas Nickas, Petitioner, versus Immigration and Naturalization Service, Respondent, Case No. 17316, dated October 29, 1964, has been reported in the Federal Reporter at 337 F.2d 733 (8th Cir. 1964). A copy of the printed opinion of the Court of Appeals in this cause is set forth in Appendix A at the end of this petition.

The opinion of the Special Inquiry Officer, Immigration and Naturalization Service, United States Department of Justice, dated November 30, 1962, in this cause, entitled "In The Matter of Athanasios Patsis, also known as Thomas

Nickas", File No. A 5696076, is unreported. A copy of that opinion is set forth in Appendix A at the end of this petition.

The opinion of the Board of Immigration Appeals, United States Department of Justice, in this cause, entitled "In Re: Athanasios Patsis, a/k/a Thomas Nickas in Deportation Proceedings", File No. A 5696076, is unreported. A copy of that opinion is set forth in Appendix A at the end of this petition.

JURISDICTION

Petitioner seeks review of the judgment of the United States Court of Appeals for the Eighth Circuit, in the case of Athanasios Patsis, a/k/a Thomas Nickas, Petitioner, versus Immigration and Naturalization Service, Respondent, dated and entered October 29, 1964. Jurisdiction of the Supreme Court of the United States is based on Title 28, United States Code Annotated, Section 1254 (1), providing for issuance of a writ of certiorari in cases in the United States Court of Appeals upon the petition of any party to any civil case after rendition of judgment.

QUESTION PRESENTED

1. Whether an alien crewman who assumed in 1948 a deportable status under the provisions of Section 19 of the Immigration Act of 1917, 39 Stat. 874, 889, 8 U.S.C. 155 (as re-enacted and amended by Section 241 (a) (1) of the Immigration and Nationality Act of 1952, 66 Stat. 163, 204, 8 U.S.C. 1251 (a) (1)) and who, during the years 1953 to 1962, was subject to deportation for violation of Section 265 of the Immigration and Nationality Act of 1952, 66 Stat. 163, 225, 8 U.S.C. 1305, is entitled to suspension of deportation by the provisions of Section 244 (a) (5) of the Immigra-

tion and Nationality Act of 1952, 66 Stat. 163, 215, 8 U.S.C. 1254 (a) (5) (prior to amendment by Section 4 of the Act of October 24, 1962, 76 Stat. 1247, 1249, 8 U.S.C. 1254 (f) (1)).

STATUTES INVOLVED

The provisions of the Immigration and Nationality Act, Sections 241 (a) (1), 244, and 265, 66 Stat. 163, 204, 215, 225, 8 U.S.C. 1251, 1254, 1305, and the Act of October 24, 1962, 76 Stat. 1247, 1249, 8 U.S.C. 1254 are set out in Appendix B at the end of this petition.

STATEMENT

Athanasios Patsis, a/k/a Thomas Nickas, petitioner, a paint shop employee, was born in February, 1904, in Greece. He has had a wife in that country since 1926 and has two children there. He is 59 years old. The children are now adults. Petitioner has not been convicted of a crime, subversion, or violence. He has provided for his wife and children while in this country.

In January, 1936, petitioner was temporarily admitted to the United States as a crewman from the S. S. Mount Para, pursuant to the provisions of Section 3(5) of the Immigration Act of 1924, 43 Stat. 153, 154. In 1942, petitioner registered for military service. After being taken into custody in January, 1943, under a deportation warrant of arrest charging him with being deportable under Section 14 of the 1924 Act, 43 Stat. 153, 162, he was on April 6, 1947, pursuant to the charge in the warrant, deported from San Francisco, California, aboard the S. S. Hellenic Beach.

On October 21, 1948, he returned to the United States aboard the Hellenic Beach and was again admitted tem-

porarily as a seaman under the Immigration Act of 1924. On April 10, 1962, after having been in this country thirteen years, petitioner was served with an order to show cause why he should not be deported under Section 241(a)(1) of the Immigration and Nationality Act of 1952, 66 Stat. 163, 204, 8 U.S.C. 1251(a)(1). Section 241(a)(1) provides for the deportation of any alien who: "(1) at the time of entry was within one or more of the classes of aliens excludable by the law existing at the time of such entry." The ground asserted was that petitioner at the time of his last entry was excludable under Section 1(a) of the Act of March 4, 1929, 45 Stat. 1551, as amended by Section 7 of the Act of May, 1932, 47 Stat. 166, which provided "if any alien has been arrested and deported in pursuance of law, he shall be excluded from admission to the United States unless prior to his reembarkation at a place outside of the United States . . . the Attorney General, in his discretion, shall have granted such alien permission to reapply for admission."

At the ensuing deportation hearing held on April 25, 1962, petitioner applied under Section 244(a)(5) of the Immigration and Nationality Act of 1952, 66 Stat. 163, 215, 8 U.S.C. 1254(a)(5), for suspension of deportation, and, in the alternative, under Section 244(e) thereof, for voluntary departure in lieu of deportation. Other relief was requested which is not pertinent here.

In an opinion dated November 30, 1962, the Special Inquiry Officer held that petitioner was subject to deportation on the charge contained in the April 10, 1962, order to show cause. The application for privilege of voluntary departure under Section 244 (e) was granted. The application for suspension of deportation was denied on the ground that the provisions of Section 244 (a) (5) were inapplicable to an alien crewman by reason of amendment

by the Act of October 24, 1962, 76 Stat. 1247, 1249, 8 U.S.C. 1254 (f). The Special Inquiry Officer also assumed that the amendment to Section 244 (a) (5) did not apply to petitioner, and further held that petitioner could not meet the requirements of Section 244 (a) (5) because petitioner was deportable for not having filed an annual address report as required by Section 265 of the Immigration and Nationality Act of 1952, 66 Stat. 163, 225, 8 U.S.C. 1305.

The Board of Immigration Appeals sustained the Special Inquiry Officer's decision in an opinion dated March 8, 1963. A petition for review was perfected under the provisions of Section 106 (a) of the Immigration and Nationality Act of 1952, 8 U.S.C. 1105 (a), as added September 26, 1961, effective October 26, 1961, Pub. L. 87-301, § 5 (a), 75 Stat. 651. On October 29, 1964, the United States Court of Appeals for the Eighth Circuit denied the relief requested in the petition for review.

That Court held that petitioner was not entitled to suspension of deportation by the provisions of Section 244 (a) (5) of the Immigration and Nationality Act of 1952, 66 Stat. 163, 215, 8 U.S.C. 1254 (a) (5) (prior to amendment by Section 4 of the Act of October 24, 1962, 76 Stat. 1247, 1249, 8 U.S.C. 1254 (f)), even though petitioner had assumed a deportable status in 1948 under the provisions of Section 19 of the Immigration Act of 1917, 39 Stat. 874, 889, 8 U.S.C. 155 (as re-enacted and amended by Section 241 (a) (1) of the Immigration and Nationality Act of 1952, 66 Stat. 163, 204, 8 U.S.C. 1251 (a) (1)) for the reason that petitioner was also subject to deportation during the years 1953 to 1962 for violation of the provisions of Section 265 of the Immigration and Nationality Act of 1952, 66 Stat. 163, 225, 8 U.S.C. 1305.

That Court also assumed and held for the purposes of this case only that the exclusion-of-a-crewman provi-

sion of Section 4 of the Act of October 24, 1962, 76 Stat. 1247, 1249, 8 U.S.C. 1254 (f), was not to be applied to petitioner so as to bar application for suspension of deportation under the provisions of Section 244 (a) (5) of the Immigration and Nationality Act of 1952, 66 Stat. 163, 215, 8 U.S.C. 1254 (a) (5).

FEDERAL JURISDICTION BELOW

The jurisdiction of the United States Court of Appeals for the Eighth Circuit in this cause was based on the provisions of Section 106 (a) of the Immigration and Nationality Act of 1952, 8 U.S.C. 1105(a), as added September 26, 1961, effective October 26, 1961, Pub. L. 87-301, 5 (a), 75 Stat. 651, which provides for the exclusive jurisdiction of a Court of Appeals to review a final administrative order of deportation of the Board of Immigration Appeals, United States Department of Justice.

ARGUMENT

Petitioner seeks a writ of certiorari for the reason that the decision of the United States Court of Appeals for the Eighth Circuit in his case, 337 F.2d 733 (8th Cir. 1964), and the decision in the case of *Fong* v. *Immigration and Naturalization Service*, 308 F.2d 191 (9th Cir. 1962), are in conflict as to the law to be applied in factually similar deportation matters involving the interpretation of the suspension provisions of Section 244 (a) (5) of the Immigration and Nationality Act of 1952, 66 Stat. 163, 215, 8 U.S.C. 1254 (a) (5). In addition the Eighth Circuit ruling and the decision in *Fong* decided an important question of federal law—the proper interpretation to be given Section 244 (a) (5)—which has not been, but should be, settled by the Supreme Court.

As will be set out in detail below, petitioner states that this case, therefore, satisfies two reasons considered in granting a writ of certiorari, which are set out in Supreme Court Rule 19 (b) as follows:

> "(b) Where a court of appeals has rendered a decision in conflict with the decision of another court of appeals on the same matter; . . . or has decided an important question of federal law which has not been, but should be, settled by this court. . . ."

Initially, it must be pointed out that the Eighth Circuit Court of Appeals in *Patsis* assumed and decided, on page 739 of its opinion, that for the purposes of this case petitioner would not be denied recourse to the suspension provisions of Section 244 (a) (5) by reason of Section 4 of the Act of October 24, 1962, 76 Stat. 1247, 1249, 8 U.S.C. 1254 (f) (1). This amendment added the following pertinent language to Section 244:

> "(f) No provision of this section shall be applicable to an alien who (1) entered the United States as a crewman. . . ."

When the possible effect of this amendment is removed as a factor in this case, the conflict between the Fong case and this case becomes apparent.

Paragraph (a) (5) of Section 244, 8 U.S.C. § 1254 (a) (5) with the introductory paragraph of the section, reads as follows:

> "§1254. (a) As hereinafter described in this section, the Attorney General may in his discretion, suspend deportation and adjust the status to that of an alien lawfully admitted for permanent residence, in the case of an alien who . . . (5) is deportable under paragraphs (4)-(7), (11), (12), (14)-(17), or (18) of Section 1251 (a) of this title for an act committed or status acquired subsequent to such entry into the United

States within two years prior to, or at any time after June 27, 1952, is deportable under paragraph (2) of Section 1251 (a) of this title as a person who has remained longer in the United States than the period for which he was admitted; has been physically present in the United States for a continuous period of not less than ten years immediately following the commission of an act, or the assumption of a status, constituting a ground for deportation, and proves that during all such period he has been and is a person of good moral character; has not been served with a final order of deportation issued pursuant to this chapter in deportation proceedings up to the time of applying to the Attorney General for suspension of deportation; is a person whose deportation would, in the opinion of the Attorney General, result in exceptional and extremely unusual hardship to alien or to his spouse, parent, or child, who is a citizen or an alien lawfully admitted for permanent residence."

Both Fong and Patsis applied for the suspension relief provided by Section 244(a)(5) before a final order of deportation was issued. Fong was found deportable for failure to furnish notice of address as required by Section 265 of the Immigration and Nationality Act of 1952, 66 Stat. 163, 225, 8 U.S.C. 1305. Fong was also deportable and assumed a deportable status (but was not so charged) in about 1944 for violation of Section 241(a)(2) of the Immigration and Nationality Act of 1952, 66 Stat. 163, 204, 8 U.S.C. 1251(a)(2) for illegally remaining in the United States in 1944 or for accepting unauthorized employment.

Petitioner was found deportable under the provisions of Section 241(a)(1) of the Immigration and Nationality Act of 1952, 8 U.S.C. 1251(a)(1) for being, in 1948, a member of a class of persons excludable by existing law. Petitioner also had not complied with Section 265 because he had not filed notification of address beginning

in 1953. However, petitioner was not charged with this as a ground for deportation under Section 241(a)(5) of the Immigration and Nationality Act of 1952, 66 Stat. 163, 204, 8 U.S.C. 1251(a)(5).

Both Fong and Patsis established good character from 1944 and 1948, respectively, and neither individual was convicted of a crime during his stay in the United States. Hardship is present in both cases.

Under these facts the Ninth Circuit Court of Appeals held that Fong met the requirements of Section 244(a)(5). Those portions of the order of the Immigration and Naturalization Service finding Fong ineligible for suspension of deportation were set aside as invalid. That Court held Fong assumed a "deportable status" in 1944 under the provisions of Section 244(a)(5) by having been subject to deportation under Section 241(a)(2). That Court found Fong also deportable for failure to file notification of address under Section 265 and found that this violation satisfied the list of deportable grounds set forth in Section 244(a)(5) as prerequisites to its operation.

That Court found that Fong's ten year deportable status acquired in 1944 by violation of Section 241(a)(2) was not destroyed by the fact that Fong also acquired a deportable status in 1953 for failure to comply with Section 265. In this regard that Court found Section 244(a)(5) was to be interpreted as requiring the computation of the ten year deportable status period from the first deportable offense or in other words from the first assumption by the alien of a deportable status. In this regard that Court found any other interpretation would give Section 244(a)(5) an irrational meaning because by its terms Section 244(a)(5) would ameliorate the drastic effects of deportation as to persons convicted of such serious crimes

as illicit traffic in narcotics, sedition, and possession of automatic weapons, who thereafter established a ten year period of good character; but the effect of Section 265 would bar suspension of deportation as to Fong, whose offense was failure to file notification of address under Section 265. In other words, that Court found that violation of Section 265 is innocuous and minor, so as to have rendered Fong's behavior from 1944 acceptable within the ten year good character standard of Section 244(a)(5).

On the other hand, under similar facts the Eighth Circuit Court of Appeals found that Patsis did not meet the requirements of Section 244(a)(5). That Court dismissed petitioner's petition for review.

The Court in Patsis agreed with the holding in the Fong case and found that petitioner's deportable status acquired in 1948 under Section 241(a)(1), a section not referred to by Section 244(a)(5), satisfied the ten year good character standard of Section 244(a)(5). However, *Patsis* held that petitioner's ten year deportable status acquired in 1948 by reason of violation of Section 241(a)(1) was destroyed in 1953 when petitioner also acquired a deportable status for failure to comply with Section 265. The Court in Patsis held that petitioner's successive offenses for violation of Section 265 rendered petitioner's behavior immoral and hence petitioner's behavior was non-acceptable within the ten year good character standard of Section 244(a)(5).

There is no doubt that the Eighth Circuit in Patsis specifically and unequivocally disagreed with the holding of the Ninth Circuit in Fong as to the effect of violations of Section 265 upon an alien's compliance with the ten year good character requirement of Section 244(a)(5). On page 742 of its opinion the Eighth Circuit stated:

". . . we must disagree with this particular result reached by the Ninth Circuit in *Fong* and with its characterization, p. 195 of 308 F.2d, of the filing requirement (of Section 265) as 'only a minor infraction of law'. Congress has classified it otherwise.

Accepting this joint classification, as we do, it follows that the 10-year period must be one of acceptable behavior for all in the classification, including the nonfiler." (words in parentheses added.)

It is petitioner's position that the decisions of the Eighth and Ninth Circuit Courts of Appeal are diametrically in conflict and irreconcilable. It must also be noted that the Immigration and Naturalization Service did not petition for certiorari in *Fong*.

Petitioner also submits that an important question of federal law, not heretofore decided, but which should be decided by this Court, is present here. It is petitioner's position that this Court should rule on the proper interpretation to be given Section 244 (a) (5) when an alien who otherwise meets the ten year deportation status and good character tests of Section 244 (a) (5), is, at the same time, also subject to deportation for violations of Section 265.

CONCLUSION

For the reasons submitted, petitioner respectfully requests that this Petition for Writ of Certiorari be granted.

Respectfully submitted,

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HARRY D. PENER
Counsel for Petitioner

APPENDIX A

Opinions Below

Athanasios PATSIS, a/k/a Thomas Nickas, Petitioner,

v.

IMMIGRATION & NATURALIZATION SERVICE, Respondent.

No. 17316.

United States Court of Appeals
Eighth Circuit.

Oct. 29, 1964.

Before VOGEL, MATTHES and BLACKMUN, Circuit Judges.

BLACKMUN, Circuit Judge.

Athanasios Patsis petitions for review of a final order of the Board of Immigration Appeals dismissing his appeal from an order of the Special Inquiry Officer. The exclusive jurisdiction of a court of appeals to review this administrative determination is now established by Foti v. Immigration & Naturalization Service, 375 U.S. 217, 229-232, 84 S. Ct. 306, 11 L.Ed.2d 281 (1963), and by § 106(a) of the Immigration & Nationality Act,[1] 8 U.S.C. § 1105a, as added September 26, 1961, effective October 26, 1961, Pub.L. 87-301, § 5(a), 75 Stat. 651. Inasmuch as the proceedings before the Special Inquiry Officer were conducted in Kansas City, Missouri, and Patsis' present residence is in that city, venue is in this court. Section 106(a) (2).

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1. Because of the many statutes which are pertinent to this case, we do not encumber this already too lengthy opinion by setting them forth even by footnote. Anyone interested is assumed necessarily to have access to the complete texts.

Patsis v. *Immigration & Naturalization Service*

Patsis, a paint shop employee, was born in February 1904. He is a native and citizen of Greece. He has had a wife in that country since 1926 and has two children there. The children are now adults. The chronology is not in dispute:

1. Patsis first arrived in the United States on January 24, 1936, as a member of the crew of the steamship "Mount Para" inbound from Buenos Aires. He was temporarily admitted as a crewman pursuant to § 3(5) of the Immigration Act of 1924, 43 Stat. 154.

2. He promptly deserted his ship and remained in this country. He assumed the name of Thomas Nickas. He was taken into custody on a deportation warrant in January 1943. After a hearing he was ordered deported and, in fact, was deported from San Francisco aboard the steamship "Hellenic Beach" on April 6, 1947.

3. He returned to the United States as a member of the crew of the same ship on October 21, 1948, and was again admitted temporarily under the 1924 Act as a seaman. He deserted his ship once more and remained here. He possessed no immigration visa or other document authorizing his admission for permanent residence.

4. In April 1962 he was served with an order to show cause why he should not be deported, pursuant to § 241(a)(1) of the Immigration & Nationality Act, 8 U.S.C. § 1251(a)(1), in that "at the time of entry", October 21, 1948, he "was within one or more of the classes of aliens excludable by the law existing at the time of such entry", that is, he was excludable at the time of that entry under § 1(a) of the Act of March 4, 1929, as amended, 45 Stat. 1551 and 47 Stat. 166. This latter Act provided that "if any alien

has been arrested and deported in pursuance of law, he shall be excluded from admission to the United States" unless "prior to his reembarkation at a place outside the United States * * * the [Attorney General], in his discretion, shall have granted such alien permission to reapply for admission".

His deportation hearing was held in March and April 1962. It was there conceded that Patsis had not, before the 1948 reentry, received permission to apply or reapply for subsequent admission to the United States. Counsel, however, would not admit that Patsis was subject to deportation because "this admission would be a conclusion of law".

At the hearing Patsis applied (a) for suspension of deportation, under § 244(a) of the Act in its 1952 form, 8 U.S.C. § 1254(a), that is, as the statute read prior to the amendment effected October 24, 1962, by Pub.L. 87-885, § 4, 76 Stat. 1247; (b) for a waiver, under § 211(b), 8 U.S.C. § 1181(b), of documents otherwise required, on the ground that "I did not intend to remain in U.S. when I entered"; (c) for permission, under § 212 (a) (17), 8 U.S.C. § 1182(a) (17), to reapply for admission, nunc pro tunc as of the date of his last entry, on the ground that "It would be an extreme hardship to have to return to Greece. I have lived and worked in U.S. for 25 yrs. and own property here. I could not live nor find work in Greece"; and d), in the alternative, for voluntary departure at his own expense in lieu of deportation, under § 244(e), 8 U.S.C. § 1254(e).

The Special Inquiry Officer, by his decision dated November 30, 1962, found Patsis was deportable, granted his request for voluntary departure in lieu of deportation, ordered deportation in the event he failed to depart volun-

tarily, and denied all other requested relief. In so doing the Officer concluded that:

1. Patsis was deportable because, under the 1929 Act, as amended, he had been deported before and had reentered without permission to reapply for admission.

2. Patsis' application for waiver of entry documents under § 211(b) could not be granted because: his only entries into this country were as a crewman; he had never acquired the status of a lawful permanent resident of the United States; the provisions of § 211(b) are discretionary and have application only to "otherwise admissible aliens lawfully admitted for permanent residence who depart from the United States temporarily" and were therefore not available to him; there is no other statutory authority for the admission of an alien for permanent residence unless he has an immigration visa; and the discretionary adjustment of status provisions of § 245(a), 8 U.S.C. § 1255(a), by their very terms, have not been applicable to "an alien crewman" since the section's amendment in 1960 by Pub.L. 86-648, 74 Stat. 505.

3. Patsis' application for nunc pro tunc permission to reapply under § 212(a) (17) could not be granted because the only basis for such permission "is to remove a ground of inadmissability except for which an alien would not be deportable", and such was not the situation here.

4. Patsis' application for suspension of deportation under § 244 could not be granted inasmuch as:

> a. This statute, by its paragraph (f), added in October 1962, flatly provides "No provision of this section shall be applicable to an alien who (1) entered the United States as a crewman; * * *".

b. The fact Patsis' application for suspension was filed on April 25, 1962, before the October enactment of § 244(f), and at a time when the statute did not specifically exclude a crewman from its discretionary suspension benefits is of no significance where the Officer's decision is made subsequent to the adoption of the statute.

c. Anyway, Patsis did not qualify for suspension under § 244 as it read prior to the 1962 amendment and the addition of paragraph (f). This is so because (i) his application was not filed within five years after the effective date of the Act (December 23, 1952) as required by § 244(a) (1); (ii) inasmuch as he last entered the United States in 1948, he is not within the period ("Within two years prior to, or at any time after the date of the enactment of this Act" [June 27, 1952]), required for relief under § 244(a) (2), (3), (4), and the second alternative of (5); and (iii) the claim that Patsis was deportable under one of the specified paragraphs, namely, § 241(a) (5), with its reference to § 265, 8 U.S.C. § 1305 (willful failure to file an address report card), is not helpful to him under the first alternative of § 244(a) (5) because it was not the charge lodged against him and because, in any event, never having filed an address report card at all, he has not fulfilled the 10-year requirement of § 244(a) (5).

In granting voluntary departure the Officer concluded that, although Patsis admitted a common law relationship with a woman in the United States until about 1951 and her attainment of an Iowa divorce from him in 1950 with a property settlement, while at the same time he had a wife and children in Greece, he had established "good moral character for at least five years immediately preceding his application", as § 244(e) prescribes, and the possession of means with which to depart promptly.

We thus have a situation where Patsis has been frustrated in all his attempts to legalize his entry and status in the United States. The facts remain that he did effect an illegal entry, not once but twice; that he jumped ship; that when he stayed, he knew the illegality of the entries thus effected; and that the second entry was made after he had already been deported formally once.

We have described the Special Inquiry Officer's disposition of the case in detail in order to show the several points which were raised before him, his analysis of the complicated statutes, and his resolution of some factors in Patsis' favor so that every provision of the Act which has any conceivable application could be considered. As stated at the beginning of this opinion, the Board of Immigration Appeals sustained the Officer's decision. In so doing it concluded, "We know of no administrative relief for which respondent is eligible other than voluntary departure".

Patsis' case as presented to us centers on the issue of the availability to him of the several discretionary suspension of deportation provisions of § 244; if any of these is available, the Officer and the Board erred in denying consideration of his case by the Attorney General. The following questions arise:

May the exclusion-of-a-crewman provision of §244(f), which came into the statute only in October 1962 after Patsis had filed his application for suspension, be validly applied to him?

If not, then, it being readily apparent, for the reasons stated by the Officer, that paragraphs (1), (2), (3), (4), and the second alternative of (5) of § 244(a) have no pos-

sible application to Patsis, is he deportable under the first alternative of paragraph (5)?

We discuss these and their several aspects in turn:

1. *Section 244(f) (1), 8 U.S.C. § 1254(f) (1).* Although urging that § 244(f) (1) "should not apply to his case, Patsis, in effect, concedes that it is not an ex post facto law, within the proscription of art. I, § 9, clause 3, of the federal Constitution, for in his brief he states, "Actually, this may not be a true *ex post facto* case even though the amendment did disqualify petitioner". In any event, it seems to be settled, despite continuing dissents, that the clause does not apply to statutorily specified grounds for deportation and that retroactive application of new grounds is not unconstitutional. Marcello v. Bonds, 349 U.S. 302, 314, 75 S.Ct. 757, 99 L.Ed. 1107 (1955); Galvan v. Press, 347 U.S. 522, 531, 74 S.Ct. 737, 98 L.Ed. 911 (1954); Harisiades v. Shaughnessy, 342 U.S. 580, 594-595, 72 S.Ct. 512, 96 L.Ed. 586 (1952). See Lehmann v. United States ex rel. Carson, 353 U.S. 685, 690, 77 S.Ct. 1022, 1 L. Ed.2d 1122 (1957) and Mulcahey v. Catalanotte, 353 U.S. 692, 694, 77 S.Ct. 1025, 1 L.Ed.2d 1127 (1957).

[1, 2] Furthermore, we are concerned here with administrative power. If a statutory provision as to administrative discretion is changed between the hearing and the decision the agency must apply the new law. Ziffrin, Inc. v. United States, 318 U.S. 73, 78, 63 S.Ct. 465, 87 L.Ed. 621 (1943). Specifically, if the Attorney General's discretionary power to adjust the status of an alien crewman (assuming that the power exists in the first place) is taken away after the application has been filed but before final administrative decision, the application must be denied.

It has been so held with respect to a crewman's application for adjustment of status under § 245(a), 8 U.S.C. § 1255(a), and the 1960 amendment thereto. Fassilis v. Esperdy, 301 F.2d 429, 432, 434 (2 Cir. 1962), where the court said "* * * the Commissioner was required by the new amendment to deny the applications". And it has now been held that the same result ensues with respect to § 244(f) (1) itself when that statute's amendment took place after the crewman's application for discretionary relief and even after its eventual review by a court of appeals, Foti v. Immigration & Naturalization Service, 308 F.2d 779 (2 Cir. 1962), but before its reconsideration by the appellate court after reversal by the Supreme Court at 375 U.S. 217, 84 S.Ct. 306. Foti v. Immigration & Naturalization Service, 332 F.2d 424 (2 Cir. 1964).[2]

[3-5] Patsis would avoid this result by two arguments:

a. He suggests that the Special Inquiry Officer "conveniently" delayed his decision from April 25, 1962, when the hearing ended, to November 30, when his decision was entered, in order to take advantage of the October 1962 amendment which then was pending in Congress. On this record, however, we cannot draw any such conclusion. The record contains nothing whatsoever indicative of purposefully prejudicial delay. Further, Patsis made no claim along this line before the Board to which he thereafter appealed. Any claim of improper conduct

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2. The Supreme Court, in its fourth footnote in Foti, supra, p. 220 of 375 U.S., 84 S.Ct. 306, noted the enactment of the 1962 amendment, felt that its applicability to that alien was arguable, and concluded that it did not necessarily render moot the jurisdictional issue then under consideration by the Cou

or non-feasance by the Officer should first be presented to the agency if it is to be considered on appellate court review. Unemployment Compensation Comm'n. v. Aragon, 329 U.S. 143, 155, 67 S.Ct. 245, 91 L.Ed. 136 (1946); United States v. L. A. Tucker Truck Lines, Inc., 344 U.S. 33, 73 S.Ct. 67, 97 L.Ed. 54 (1952); Hart v. ICC, 226 F.Supp. 635, 643 (D. Minn. 1964).[3] Patsis, not having raised the issue before the Board of Immigration Appeals, and apparently possessing, as to it, nothing of greater dignity than mere suspicion, is not entitled to raise it here.

[6] b. Apart from any question of motive in the alleged delay in the Officer's decision, Patsis suggests that he should not be made to suffer by the lapse of intervening time.[4] He relies on the income tax interest case of United States v. Magnolia Petroleum Co., 276 U.S. 160, 162-163, 48 S.Ct. 236, 237, 72 L.Ed. 509 (1928) ("Statutes are not to be given retroactive effect or construed to change the status of claims fixed in accordance with earlier provisions unless the legislative purpose so to do plainly appears"); the death-of-a-party case of Mitchell v. Overman, 103 U.S. 62, 64-65, 26 L.Ed. 369 (1881); and Judge Bryan's

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3. The Special Inquiry Officer's affidavit, submitted on this appeal, to the effect that the delay was occasioned by central office instructions to await the possible enactment of other then pending legislation which would have been favorable to Patsis, is perhaps revealing, but should be passed on in the first instance at the administrative level. SEC v. R. A. Holman & Co., 116 U.S.App.D.C. 279, 323 F.2d 284, 287 (1963) cert. denied 375 U.S. 943, 84 S.Ct. 350, 11 L.Ed.2d 274.

4. This, of course, assumes that the Officer's decision necessarily would have been in Patsis' favor had it been issued prior to the enactment of § 244(f) on October 24. The Officer by his decision held otherwise.

opinions in the naturalization cases of Application of Martini, 184 F.Supp. 395, 400-402 (S.D. N.Y. 1960), and Matter of Vacontios, 155 F.Supp. 427 (S.D. N.Y. 1957). We doubt whether the facts of these four cases provide a valid precedent for the application of their principle to the facts of this case. See the decision of the Second Circuit in Fassilis, supra, p. 434 of 301 F.2d, where, however, the time lapse in each of the cases consolidated for that appeal was less than that present here. In any event, we agree with Judge Waterman when he there said, pp. 432-433 of 301 F.2d:

> "* * * the appellants had no established right to the future status that they were seeking to obtain by their applications. * * * [T]he status each of them sought the agency to award them was not acquirable until final administrative action upon their applications."

[7] 2. *Section 405(a) of the 1952 Act.* This Act, in its § 405(a), contains a savings clause which provides generally that nothing in the Act "shall be construed to affect the validity" of any proceeding "which shall be valid at the time this Act shall take effect". See 8 U.S.C.A. § 1101, historical note. Patsis argues that the policy which obviously occasioned this savings clause should have equal application to the amendment effected in 1962 by the addition of § 244(f). We do not agree because, first, § 405(a), although broad, speaks narrowly in terms of "this Act" and "the time this Act shall take effect" and thus implies its non-application to amendments in the future; second, the 1962 Act itself contains no comparable savings clause; and, third, the reasoning in Fassilis and the second Foti persuades us otherwise.

Therefore, absent other considerations, we would agree with the conclusions reached by the Second Circuit in Fassilis and in the second Foti, and would hold that we have no alternative than to conclude that Congress' flat prohibition of the application of § 244(f) "to an alien who * * * entered the United States as a crewman" bars discretionary suspension of deportation for Patsis. This would end his case.

But because deportation is so drastic a penalty and can be the equivalent of banishment or exile, Delgadillo v. Carmichael, 332 U.S. 388, 391, 68 S.Ct. 10, 92 L.Ed. 17 (1947); Fong Haw Tan v. Phelan, 333 U.S. 6, 10, 68 S.Ct. 374, 92 L.Ed. 433 (1948), and because we do not wish to give less than the utmost consideration to this alien, we assume, for purposes of this case only, that § 244(f) (1) is not to be applied to Patsis, and we pass on to the other points he raises.

3. *Section 244(a) (5) and the cross-references to §§ 241(a) (5) and 265, 8 U.S.C. §§ 1254(a) (5), 1251(a) (5), and 1305.* Section 265 provides that an alien who is in the country on January 1 of any calendar year and who was required to be registered, shall notify the Attorney General in writing of his current address within 30 days. Section 241(a) (5) makes noncompliance with § 265 a deportable offense unless reasonably excusable or not willful. And § 244(a) (5) makes deportation under § 241(a) (5) subject to discretionary suspension.

Patsis concedes his failure both to register and to file an address card annually at any time since his entry in 1948. He then argues that he willfully violated § 265, that this is a deportable offense, and that he is subject to discretionary suspension.

But § 244(a) (5) imposes conditions for the availability of its discretionary relief. Among these is the requirement that the alien be "physically present in the United States for a continuous period of not less than ten years immediately following the commission of an act, or the assumption of a status, constituting a ground for deportation, and proves that during all of such period he has been and is a person of good moral character". We defer for the moment the requirement of good moral character. The question, then, is whether Patsis had satisfied the 10-year condition. Obviously, at the time of his application, he had been in the United States continuously for more than 10 years since his last entry. He had been here continuously for more than 10 years since he committed the offense of illegal entry for which he would be deportable under § 241(a) (1). He had been here continuously for more than 10 years since he first failed to register under the 1940 Act. And he had been here continuously for more than 10 years since he first failed to file the annual address card required, for the first time, by § 24 of the Subversive Activities Control Act of 1950. But he had *not* been here continuously for more than 10 years since he failed to file any annual address card required under the 1952 Act.

The statement of these facts at once raises several subsidiary questions: (a) Is the 10-year period confined to those deportable offenses to which § 244(a) (5) itself makes reference? If so, Patsis' 1948 entry, illegal under § 241(a) (1), and as to which he is charged, is not helpful for this is not one of the paragraphs referred to in § 244(a) (5). (b) Is failure to file the annual address card confined to such failure under the 1952 Act and inapplicable to failure under the 1950 Act? If so, inasmuch as the 1952 Act

was effective only on December 23, 1952, and the first address card was required under it only in January 1953, Patsis clearly had not fulfilled the 10-year requirement when he applied for discretionary suspension in April 1962 or even by the time the Special Inquiry Officer rendered his decision in November 1962. (c) Is the 10-year requirement satisfied when a decade elapses from the first commission of a deportable act or does the later commission of another such act within 10 years of the application mean that the 10-year requirement is not satisfied or, to put it another way, may the lapse of 10 years from the first deportable offense enable the alien to commit subsequent deportable offenses with impunity so far as his discretionary status is concerned?

The first of these three questions we need not face. It certainly is an arguable one. But the Ninth Circuit, in Fong v. Immigration & Naturalization Service, 308 F.2d 191, 194-196 (1962), appears to have held that a decade of deportable status under a section not referred to by § 244(a)(5) satisfies the latter's 10-year requirement. For the purpose of the present case we accept that result without expressing either agreement or disagreement with it.

[8] The second of the three questions, it seems to us, is clearly to be answered in the affirmative. The annual filing of an address card was required for the first time under the 1950 Act. But failure to file a card was not made a deportable offense until the 1952 Act became effective. Matter of V—R—, 9 I & N Decisions 340, 347 (1961). See Fong, supra, where the court said, p. 194 of 308 F.2d, with respect to an alien who had been in the country since 1943 and was in deportable status on another ground since 1944, "His first violation under this provision

[failure to report annually] occurred about February 1, 1953". Thus, Patsis' first failure to file an address report which qualified as a deportable offense was in January 1953, and 10 years had not elapsed at the time he filed his application.

[9] This takes us to the third question and the application of the 10-year requirement of § 244(a) (5) to successive offenses. Our initial reaction was that the 10-year requirement is, so to speak, the imposition of a testing period; that each failure to file as required by § 265 is a separate and distinct offense; that each such failure is, indeed, one made criminal by § 266(b), 8 U.S.C. § 1306(b), and there, also, (in addition to the interplay of §§ 241(a) (5) and 265) subjects the offender to deportation; and that the purpose of the 10-year requirement is to provide relief, by way of possible suspension of deportation, for an alien whose behavior during the decade immediately preceding his application has been acceptable under the statutory standard. We would have regarded it as a matter of common sense interpretation not to wring good fortune for an alien out of the statute because of a deportable offense committed more than 10 years previously when he continues to commit other deportable offenses in the interim. The 10-year span surely must have been a qualifying period which the Congress felt to be of sufficient length to provide enough assurance that the alien would be an acceptable addition to society despite any misstep of a decade or more ago. To hold otherwise would penalize an alien who commits only one deportable offense (such as a willful failure to file an address card in only one year) and commits it within the 10-year period, as contrasted with an alien whose record of deportable misdeeds not only takes in the immediate

past decade but stretches back before it. This could not have been the sense of Congress in enacting § 244(a) (5).

Patsis argues that this interpretation "would completely eliminate" failure to report "as one basis for granting suspension of deportation", and that this is so because registration reveals the alien's presence in the country, alerts the authorities, and reduces his chances of remaining. This, however, is not a game which the Nation plays with aliens. We are not persuaded by this approach and, apparently, neither is the Service. In Matter of V—R—, supra, the Board of Immigration Appeals computed the determinative 10-year period from the date of the last, not the first, failure to register. It recognized that there may be some inconsistency in the statute but it said, p. 344 of 9 I & N Decisions,

> "Moreover, it seems quite unlikely to us that Congress could have intended that the alien whose wrongdoing continued to the moment of his apprehension should have the same favorable opportunities as the alien whose wrongdoing ceased ten years prior to his apprehension."

We were disturbed, therefore, when the Service, not Patsis, called our attention to Fong on this point, for in that case the Ninth Circuit held otherwise and ruled that a deportable status acquired more than 10 years earlier satisfied the 10-year condition, despite a violation of the address filing requirement within the decade. This conclusion appears to have been reached on the grounds that (a) the statute does not state that the 10-year period is to run after the alien last became deportable; (b) the statute is thus open to two possible constructions; (c) Fong's misadventure was "innocuous and minor" as compared with

the type of conduct condemned under the other paragraphs to which § 244(a) (5) refers; and (d) deportation is a drastic measure. Pp. 194-95 of 308 F.2d. Certiorari was not applied for in Fong.

The facts of Fong were appealing. That alien was a Chinese native who worked as a seaman on a British tanker in the last war. He was rescued when his ship was sunk. His admission to the United States in 1943 "was to allow him to ship out as a seaman or otherwise give service in the war effort". He registered for military service. He had no criminal record. Hardship was present. There was no evidence that he had any connection with subversive groups. Patsis' facts are somewhat less appealing, for he twice has made illegal entry and has experienced deportation. Still, he, as Fong, has not been convicted of subversion, violence, or crime.

We deal, however, with a statute as it has been enacted by Congress and we feel that it is not for the courts to measure whether failure to file address cards does or does not equate with subversion and immorality. Congress has said in so many words, and clearly, that it does.

The legislative history provides atmosphere and lends additional support to our conclusion. See Eichenlaub v. Shaughnessy, 338 U.S. 521, 532, 70 S.Ct. 329, 94 L.Ed. 307 (1950), and Costello v. Immigration & Naturalization Service, 376 U.S. 120, 124, 84 S.Ct. 580, 11 L.Ed.2d 559 (1964). The device of suspension of deportation for aliens who, despite deportability, have proved themselves to be acceptable residents, first appeared in the Alien Registration Act of 1940, § 20, 54 Stat. 671. The list of aliens eligible for suspension was broadened by the Act of July 1, 1948, 62 Stat. 1206. The 1948 Act, however, did not change the

1940 Act's prohibition of the granting of suspension to aliens of the subversive and immoral classes. The Subversive Activities Control Act of 1950 rested on detailed legislative findings as to the Communist movement. See Carlson v. Landon, 342 U.S. 524, 534-537, 72 S.Ct. 525, 96 L.Ed. 547 (1952). It required for the first time the annual address report and made noncompliance a crime. The current 1952 Act was adopted in the midst of the Korean War. It continued, in its § 265, the requirement of an annual address report and, in its § 266(b), the criminal provision, but for the first time it also provided, by § 241(a)(5), for deportability for violation of the reporting requirement unless reasonable excuse or absence of willfulness was established. This was classified, through § 244(a)(4) and (5), with the subversive and the immoral. This must have been done with the thought that annual filing was an effective way to combat Communism and to keep track of those aliens engaged in subversion. For these aliens, the longest residence requirement, that of 10 years, was established. Paragraphs (1), (2), and (3) of § 244(a) have residence requirements of only seven or five years. Furthermore, as to an alien covered by § 244(a)(1), (2), or (3), a grant of suspension is *absolute* unless a resolution of disfavor is timely adopted by either the Senate or the House. § 244(b). On the other hand, as to an alien covered by § 244(a)(4) or (5), a grant of suspension is *ineffective* unless the Congress favors the suspension by concurrent resolution. § 244(c). Thus, the one becomes effective in the event of inaction by both Houses of Congress. The other becomes effective only in the event of positive action by both Houses.

All this demonstrates a purposeful classification by Congress, for reasons which it deemed sufficient, of the

nonfiler together with the subversive and the immoral. Accordingly, despite the customary strict approach to these immigration statutes, Costello v. Immigration & Naturalization Service, supra, p. 128 of 376 U.S., 84 S.Ct. 580, we must disagree with this particular result reached by the Ninth Circuit in Fong and with its characterization, p. 195 of 308 F.2d, of the filing requirement as "only a minor infraction of law". Congress has classified it otherwise.

Accepting this joint classification, as we do, it follows that the 10-year period must be one of acceptable behavior for all in the classification, including the nonfiler. It would be unthinkable that the further commission of a subversive or immoral act of the kind contemplated by § 244(a) (4) would lose significance because of the presence of a similar kind of act more than 10 years earlier. Impunity, whether it be for the socially undesirable or for the one who fails to file, is not so easily to be gained.

[10] 4. *Section 244(a) (5) and immorality.* Patsis asserts that it is uncontradicted in the record that he was "guilty of the crimes of bigamy and adultery under the laws of the State of Iowa"; that because of this he was deportable under § 244(a) (5); and that these criminal acts terminated more than 10 years prior to the filing of his application. There is no merit in this suggestion. Deportability under § 244(a) (5), with respect to a post-entry crime of moral turpitude, relates only to § 241(a) (4), and this statute in turn requires conviction for the crime. Patsis has not been convicted of either bigamy or adultery. His admissions, consequently, have no materiality here.

Of course, there are elements of hardship in Patsis' case. We are not unaware of these. But, in a very real

sense, they are of Patsis' own making. They exist because of his illegal entries and because of his attainment of a measure of success in this country. Nearly every contested deportation case has its hardship aspect. We think that the solution to his problem is not judicial action but is congressional action, similar, perhaps, to that proposed by § 4 of House Bill No. 11911, 87th Cong., introduced in 1962 but not enacted. Thus far, the acts of Congress, as we see them, do not provide him an avenue of relief. Compare Mrvica v. Esperdy, 376 U.S. 560, 84 S.Ct. 833, 11 L.Ed.2d 911 (1964).

With some reluctance on our part, the relief requested by the petition for review is denied.

Board's March 8, 1963, Order

U.S. DEPARTMENT OF JUSTICE
Board of Immigration Appeals

MARCH 8, 1963.

File: A-5696076—Kansas City, Mo.

In re: Athanasios Patsis aka Thomas Nickas in Deportation Proceedings.

Appeal on Behalf of Respondent: Albert J. Yonke, Esquire, 1014 Argyle Building, Kansas City, Missouri.

Charges: Order: Sec. 241(a)(1), I&N Act (8 USC 1251(a)(1)—Excludable—arrested and deported—no permission to reapply.

Lodged: None.

Application: Nunc pro tunc permission to reapply; application for waiver of passport and visa; suspension of deportation or voluntary departure.

Board's March 8, 1963, Order

This is an appeal from the order of the special inquiry officer finding respondent deportable upon the ground stated above and granting him voluntary departure.

Respondent, a 59-year-old married male, a native and citizen of Greece, entered the United States as a seaman in 1936; he remained without authority and was deported on April 6, 1947. He last entered the United States on October 21, 1948 and has remained; he entered as a seaman. At the time of last entry he did not have permission to reapply after arrest and deportation. Respondent is clearly deportable on the charge urged.

Respondent has requested nunc pro tunc permission to reapply for admission after deportation, a waiver of the passport and visa requirements, and suspension of deportation. The special inquiry officer denied the applications for permission to reapply and suspension of deportation on the ground that respondent was ineligible for these reliefs. We find this was proper. A waiver of the documentary requirements can be given only to one who has the status of an alien lawfully admitted for permanent residence (sections 211 (a) and (b) of the Act, 8 USC 1181 (a) and (b)). The record establishes respondent never had the required status. Application for suspension of deportation was submitted on April 25, 1962. Subsequently, an amendment to section 244 of the Act denied suspension of deportation to an alien who last entered as a crewman. The special inquiry officer held that despite the fact that respondent's application had been filed prior to the amendment, the provision denying benefits to a crewman applied to him and made him ineligible for the relief. We have reached the same conclusion (*Matter of T-*, Int. Dec. 1266, February 11, 1963).

The application for permission to reapply was properly denied. The grant of this relief would have left respondent still deportable. We know of no administrative relief for which respondent is eligible other than voluntary departure. The appeal must be dismissed.

ORDER: It is ordered that the appeal be and the same is hereby dismissed.

THOS. G. FINUCANE,
Chairman.

Special Inquiry Officer's November 30, 1962, Decision

UNITED STATES DEPARTMENT OF JUSTICE
Immigration and Naturalization Service

NOVEMBER 30, 1962.

File: A5 696 076—Kansas City

In the Matter of Athanasios Patsis, also known as THOMAS NICKAS Respondent.

In deportation proceedings

Charge: I&N Act—Section 241(a)(1)—Excludable—Arrested and deported—No permission to reapply.

Application: Nunc pro tunc permission to reapply; application for waiver of passport and visa; suspension of deportation or voluntary departure.

In behalf of Respondent: Albert J. Yonke, Attorney at Law, 1014 Argyle Building, Kansas City, Missouri.

In behalf of service: Lloyd Rosander, Examining Officer, Kansas City, Missouri.

DECISION OF THE SPECIAL INQUIRY OFFICER

The respondent is a 58 year old married male. As alleged in the superseding order to show cause, the respondent admitted that he is not a national or citizen of the United States; that he is a native and citizen of Greece; that he last entered the United States at New York, New York, on October 21, 1948; that he was arrested and deported from the United States at San Francisco, California, on April 6, 1947; and that he did not receive permission to apply or reapply for subsequent admission. Counsel for the respondent declined to admit deportability on the charge in the above caption stating that that was a conclusion.

Exhibit 5 is an executed warrant of deportation, which the respondent identified as relating to him. This document verifies the respondent's deportation from San Francisco, California, on April 6, 1947. Exhibits 2 and 3 are records of sworn statements, which the respondent identified as bearing his signature. He testified at the hearing that the answer in Exhibit 2 to the question as to his intention to desert his ship prior to his last arrival in the United States was not the answer he made and that the correct answer was that he did not decide to desert until after he last arrived in the United States. The respondent also stated that the answer to the question in Exhibit 3 that he knew when he last entered the United States that he needed permission to reapply for admission after deportation was not the answer he made and that his answer was that he did not know such permission was required at the time of his last entry.

Exhibit 6 is a request for verification of arrival on Form I-423, to which there is attached a Form I-404-A,

certificate of admission of alien, which shows that Athanassios Patsas, age 44, a Greek citizen arrived at New York, New York, on October 21, 1948, aboard the S.S. Hellenic Beach, and that he was admitted as a seaman under the provisions of Section 3(5) of the Immigration Act of 1924. This document also bears an endorsement showing that he was later reported on October 26, 1948, as having deserted. The respondent identified this form I-404-A as relating to him.

The record of the deportation hearing in the case of Athanasios Patsis commenced at Seattle, Washington, on January 16, 1943, and completed on March 16, 1943, was identified by the respondent as relating to him (Exhibit 7). Page 15 of that hearing shows that the respondent was advised of the provisions of the Act of March 4, 1929, as amended, concerning the penalties for reentry into the United States after deportation unless permission is obtained from the Attorney General to reapply for subsequent admission to the United States. The evidence of record clearly establishes that the respondent was deported from the United States on April 6, 1947, and that he reentered the United States on October 21, 1948, without having received permission from the Attorney General to reapply for subsequent admission to the United States. It is, therefore, concluded that the evidence of record establishes that the respondent is subject to deportation on the charge contained in the superseding order to show cause.

The respondent applied for nunc pro tunc permission to reapply for admission after deportation, waiver of passport and visa, suspension of deportation or voluntary departure in lieu of deportation. Inasmuch as the first two applications mentioned seek relief which would legalize

the respondent's status as of the time of his last entry, they will be considered together.

In his application for nunc pro tunc permission to reapply for admission the respondent states that he desires to reenter the United States for permanent residence. He bases his application for nunc pro tunc permission to reapply upon his claim that it would be an extreme hardship for him to return to Greece as he has lived and worked in the United States for 25 years and he owns property here. He also stated that he could not live or find work in Greece. The respondent bases his application for a waiver of passport and visa (Exhibit 10) on his claim that he did not intend to remain in the United States when he last entered and that, therefore, he did not have the required passport or visa.

The evidence of record establishes that the respondent first entered the United States as a deserting seaman in 1936, following which entry he remained in this country until he was deported on April 6, 1947. He then returned to the United States on October 21, 1948, and after gaining entry as a seaman he again deserted his ship and remained in this country until the present time. The evidence of record indicates that at the time of his last entry the respondent did not have an immigration visa or any other entry document authorizing his admission to the United States for permanent residence.

Except for the provisions of Section 211(b) of the Immigration and Nationality Act (which authorizes the Attorney General in his discretion to admit without passport or immigrant visa or other documentation, otherwise admissible permanent resident aliens returning from a

temporary absence abroad) there is no authority in the Immigration and Nationality Act to admit an alien for permanent residence unless he has an immigrant visa. The provisions of Section 245 of the Act authorizing adjustment of status of certain classes of aliens to that of permanent residents specifically exempt aliens who enter the United States as crewmen. Since the evidence establishes that the respondent last entered the United States as a crewman, he therefore does not come within the provisions of Section 245. Inasmuch as the evidence of record establishes that the respondent's only entries into the United States were as a crewman and that he never had the status of a lawful permanent resident of the United States, he cannot qualify for a waiver of an immigrant visa under the provisions of Section 211(b) of the Act. There is no other provision authorizing the waiver of an immigrant visa. His application for such waiver will, therefore, be denied.

As for the respondent's application for nunc pro tunc permission to reapply, the only basis for granting such permission nunc pro tunc is to remove a ground of inadmissibility except for which an alien would not be deportable. Inasmuch as that is not the situation here, it is concluded that there is no merit to his application for nunc pro tunc permission to reapply. That application will, therefore, be denied.

Exhibit 11 is an application for suspension of deportation under the provisions of Section 244(a) of the Immigration and Nationality Act, which application was sworn to before the Special Inquiry Officer on April 25, 1962.

Special Inquiry Officer's November 30, 1962, Decision

Section 244 of the Immigration and Nationality Act was amended by the provisions of the Act of October 24, 1962 (P.L. 87/885). This amendment, in addition to making some changes in the provisions of Section 244(a) pertaining to suspension of deportation, also added subsection (f) to Section 244. Subsection (f) precludes an alien who last entered the United States as a crewman from the benefits of suspension of deportation. Inasmuch as the respondent's last entry into the United States was as a crewman, he cannot qualify for suspension of deportation under the provisions of Section 244 of the Immigration and Nationality Act, as amended by the Act of October 24, 1962.

It is true that the respondent's application for suspension of deportation was filed on April 25, 1962, at which time Section 244 of the Immigration and Nationality Act did not statutorily preclude an alien who entered the United States as a crewman from the privilege of suspension of deportation. Even if the respondent's application is considered under the provisions of Section 244(a) as it existed prior to its amendment on October 24, 1962, the respondent cannot qualify for suspension of deportation. In the first place, as his application was not filed prior to five years after the effective date of the Immigration and Nationality Act (effective December 23, 1952), it does not come within the provisions of paragraph (1) of Section 244(a) prior to its amendment. Furthermore, inasmuch as the respondent last entered the United States in 1948, which is outside of the period "within two years prior to or at any time after the date of enactment of this Act" (enacted June 27, 1952), the respondent cannot qualify under paragraphs (2), (3) or (4) of Section 244(a) of the

Immigration and Nationality Act, as enacted on June 27, 1952.

There remains to be considered only paragraph (5) of Section 244(a) of the Immigration and Nationality Act as it was originally enacted. To qualify under paragraph (5) of that section, the respondent must be "deportable under paragraphs (4), (5), (6), (7), (11), (12), 14), (15), (16), (17) or (18) of Section 241(a) of this Act for an act committed or status acquired subsequent to such entry into the United States, or having last entered the United States within two years prior to or at any time after the date of enactment of this Act is deportable under Paragraph (2) of Section 241(a) as a person who has remained longer in the United States than the period for which he was admitted." As the respondent's last entry was in 1948, he does not come within the last class of aliens specified, namely, those entering within two years prior to or at any time after the date of enactment.

The question then is whether he is deportable under any of the above enumerated paragraphs. The charge in the superseding order to show cause is under Section 241(a)(1), which is not one of those enumerated paragraphs. Counsel claims that the respondent is also deportable under the provisions of Section 241(a)(5), for wilful failure to file address report cards in January, as required by law. No such charge has been lodged against the respondent. He has stated that he did not file an address report card each January, as required by law, because he was afraid he would be picked up and sent back (Exhibit 3). At the hearing the respondent testified that he never at any time filed an address report, as required, in January of each year. The Board of Immigration Ap-

peals has held that a failure to file an address report card, as required, because of the fear of apprehension by the authorities does not establish that the failure was reasonably excusable or was not wilful and that such alien is therefore subject to deportation under the provisions of Section 241(a)(5) of the Immigration and Nationality Act (*Matter of M.*, 5 I&N Dec. 216; *Matter of B.*, 5 I&N Dec. 692).

In the *Matter of V. R.*, Int. Dec. No. 1152, the alien filed an application for suspension of deportation on the basis that he was subject to deportation under the provisions of Section 241(a)(5) of the Immigration and Nationality Act for failure to comply with the provisions of Section 265 of the Act, in that he had wilfully failed to comply with the alien registration laws during the period from 1949 to 1954. The Board there noted the contention of the Service that it was improper to go into the question of deportability under Section 241(a)(5) of the Act since no charge had been lodged against the alien under that section. However, the Board of Immigration Appeals stated that they would assume, for the sake of argument, that an alien in a deportation proceeding has the right to have any charge considered which would make him eligible for suspension of deportation. The Board then stated that the respondent's failure to comply with the provisions of Section 265 in 1[illegible] and 1954 was wilful and that it would assume, on the record, that the respondent is deportable under Section 241(a)(5). However, the Board pointed out that, in order to qualify for suspension of deportation under the provisions of Section 244(a)(5) of the Immigration and Nationality Act, an alien must prove that he "has been physically present in the United

States for a continuous period of not less than ten years immediately following the commission of an act or the assumption of a status constituting a ground of deportation." The Board stated that the rule is "that the ten years begin to run from the time the *last* thing occurred which made the alien deportable." The Board held in that case that, as the last wilful failure to register was in January, 1954, the respondent would not be statutorily eligible for suspension of deportation until 1964.

The respondent's situation in the present case, insofar as his application for suspension of deportation is concerned, is analogous to that of the alien of the *Matter of V. R., supra*. The respondent in the present proceeding has never at any time filed an address report card, as required each January by the provisions of Section 265. He stated that his failure was due to fear of apprehension by the authorities. No charge has been lodged against the respondent under the provisions of Section 241(a)(5) of the Immigration and Nationality Act. However, as stated in the *Matter of V. R., supra*, it will be assumed, for the sake of argument, that, upon the basis of the record in this case, the respondent has the right to be considered subject to deportation under the provisions of Section 241(a)(5) so as to enable him to apply for suspension of deportation under Section 244(a)(5). Inasmuch as the respondent's failure to register was because of fear of apprehension by the authorities, he has not established that his failure to register was reasonably excusable and was not willful, and it will therefore be assumed, for the sake of argument, that he would be subject to deportation under the provisions of Section 241(a)(5) of the Immigration and Nationality Act. Applying the rule laid down

by the Board of Immigration Appeals in the *Matter of V. R., supra,* inasmuch as the respondent's last failure to register was in January, 1962, and the required ten year period of physical presence in the United States began at that time, the respondent is unable to establish ten years physical presence in the United States following the last act which made him subject to deportation under the provisions of Section 241(a)(5) of the Immigration and Nationality Act and he therefore cannot qualify for suspension of deportation under the requirements of Section 244(a)(5) of that Act.

Upon the authority of the *Matter of V. R., supra,* it is concluded that the respondent is statutorily ineligible for suspension of deportation. His application for that privilege, therefore, will be denied.

The respondent also applied for the privilege of voluntary departure, at his own expense, in lieu of deportation. He testified that he and Elizabeth Resnick each own a one-half interest in an apartment building in Kansas City, which is valued at $30,000 and against which there is a mortgage of $18,000. He also stated that he has a balance of about $600 or $700 in his checking account and that he owns a 1953 Oldsmobile which is fully paid for. He stated that he works as a painter part of the time, earning about $150 a week, and that at other times he is self-employed on painting jobs.

The respondent testified that he has a wife and two children, ages 27 and 30 years, respectively, all of whom are citizens and residents of Greece. He stated that he has been supporting his wife and that during the past five years he has sent her a total of about $5,000. The respondent denied that he was ever married in the United

States but he admitted that he did live in a common law relationship with Carlotta Collins until about 1951. Exhibit 8 is a certified copy of a decree of divorce, which shows that Carlotta Nickas was granted a divorce, from Thomas Nickas on November 21, 1950, by the District Court for Woodbury County, Iowa; which decree provides that the matter of alimony and property rights of the parties was settled in accordance with the stipulation of the parties filed in court on October 26, 1950. A photo copy of this stipulation was attached to the copy of the decree, and the respondent identified the signature of Thomas Nickas at the bottom thereof as his signature.

The respondent testified that he has never been arrested at any time, although he did get one traffic ticket a number of years ago for a minor violation, the exact nature of which he said he did not remember. He also testified that he has never belonged to the Communist Party or to any organization connected with that party. The respondent presented two witnesses who have known him for about five or six years. They testified that he has a good reputation in the community, that he is honest and hard working, and a man of good moral character. Counsel presented four additional witnesses and it was stipulated by the Examining Officer at the hearing that their testimony would be substantially the same as that of the first two witnesses presented.

On the evidence of record, it is concluded that the respondent has established good moral character for the past five years and that he is willing and has the immediate means with which to depart promptly from the United States. Although the respondent did not file address report cards each January, as required by law, no charge

based on such violation has been lodged against him and it has not been adjudicated that he is subject to deportation under the provisions of Section 241(a)(5) of the Immigration and Nationality Act. Accordingly, it is concluded that, on the record, the respondent is not precluded from qualifying for the privilege of voluntary departure from the United States. In view of all of the circumstances in this case, the respondent will be granted an opportunity to depart voluntarily from the United States in lieu of deportation. The respondent designated Greece as the country to which his deportation should be directed if it is required by law.

ORDER: IT IS ORDERED, That the respondent's applications for nunc pro tunc permission to reapply, for a waiver of passport and visa, and for suspension of deportation be denied.

IT IS FURTHER ORDERED, That in lieu of an order of deportation the respondent be granted voluntary departure, without expense to the Government, within such time and under such conditions as the District Director shall direct.

IT IS FURTHER ORDERED, That if the respondent fails to depart when and as required the privilege of voluntary departure shall be withdrawn, without further notice of proceedings, and the following order shall thereupon become immediately effective: The respondent shall be deported from the United States to Greece, on the charge contained in the superseding order to show cause.

E. A. BERMAN,
Special Inquiry Officer.

APPENDIX B

Statutes Involved

Statutes Involved

1. Section 241(a) of the Immigration and Nationality Act, 8 U.S.C. 1251(a)(1), in part provides:

> SEC. 241. (a) Any alien in the United States (including an alien crewman) shall, upon the order of the Attorney General, be deported who—
>
> (1) at the time of entry was within one or more of the classes of aliens excludable by the law existing at the time of such entry;
>
> * * * * *

2. Section 244 of the Immigration and Nationality Act, 8 U.S.C. 1254, provided at the time of the deportation hearing here involved:

> SUSPENSION OF DEPORTATION; VOLUNTARY DEPARTURE
>
> SEC. 244. (a) As hereinafter prescribed in this section, the Attorney General may, in his discretion, suspend deportation and adjust the status to that of an alien lawfully admitted for permanent residence, in the case of an alien who—
>
> (1) applies to the Attorney General within five years after the effective date of this Act for suspension of deportation; last entered the United States more than two years prior to the date of enactment of this Act; is deportable under any law of the United States and is not a member of a class of aliens whose deportation could not have been suspended by reason of section 19 (d) of the Immigration Act of 1917, as amended; and has been physically present in the United States for a continuous period of not less than seven years immediately preceding the date of such application, and proves that during all of such period he was and is a person of good moral character; and

is a person whose deportation would, in the opinion of the Attorney General, result in exceptional and extremely unusual hardship to the alien or to his spouse, parent, or child, who is a citizen or an alien lawfully admitted for permanent residence; or

(2) last entered the United States within two years prior to or at any time after the date of enactment of this Act; is deportable under any law of the United States solely for an act committed or status existing prior to or at the time of such entry into the United States and is not within the provisions of paragraph (4) of this subsection; was possessed of all of the requisite documents at the time of such entry into the United States; has been physically present in the United States for a continuous period of not less than five years immediately preceding his application under this paragraph, and proves that during all of such period he has been and is a person of good moral character; has not been served with a final order of deportation issued pursuant to this Act in deportation proceedings up to the time of applying to the Attorney General for suspension of deportation; and is a person whose deportation would, in the opinion of the Attorney General, result in exceptional and extremely unusual hardship to the alien or to his spouse, parent, or child, who is a citizen or an alien lawfully admitted for permanent residence; or

(3) last entered the United States within two years prior to, or at any time after the date of enactment of this Act; is deportable under any law of the United States for an act committed or status acquired subsequent to such entry into the United States and is not within the provisions of paragraph (4) or (5) of this subsection; was possessed of all of the requisite documents at the time of such entry into the United States; has been physically present in the United States for a continuous period of not less than

five years immediately following the commission of an act, or the assumption of a status, constituting a ground for deportation, and proves that during all of such period he has been and is a person of good moral character; has not been served with a final order of deportation issued pursuant to this Act in deportation proceedings up to the time of applying to the Attorney General for suspension of deportation; and is a person whose deportation would, in the opinion of the Attorney General, result in exceptional and extremely unusual hardship to the alien or to his spouse, parent, or child, who is a citizen or an alien lawfully admitted for permanent residence; or

(4) last entered the United States within two years prior to, or at any time after the date of enactment of this Act; is deportable under paragraph (1) of section 241 (a) insofar as it relates to criminals, prostitutes or other immoral persons, subversives, violaters of narcotic laws and similar classes or under paragraph (2) of section 241 (a), as a person who entered the United States without inspection or at a time or place other than as designated by the Attorney General, or without the proper documents and is not within the provisions of paragraph (5) of this subsection; has been physically present in the United States for a continuous period of not less than ten years after such entry and immediately preceding his application under this paragraph and proves that during all of such period he has been and is a person of good moral character; has not been served with a final order of deportation issued pursuant to this Act in deportation proceedings up to the time of applying to the Attorney General for suspension of deportation; and is a person whose deportation would, in the opinion of the Attorney General, result in exceptional and extremely unusual hardship to the alien or to his spouse, parent or child, who is a citizen or an alien lawfully admitted for permanent residence; or

(5) is deportable under paragraph (4), (5), (6), (7), (11), (12), (14), (15), (16), (17) or (18) of section 241 (a) for an act committed or status acquired subsequent to such entry into the United States or having last entered the United States within two years prior to, or at any time after the date of enactment of this Act, is deportable under paragraph (2) of section 241 (a) as a person who has remained longer in the United States than the period for which he was admitted; has been physically present in the United States for a continuous period of not less than ten years immediately following the commission of an act, or the assumption of a status, constituting a ground for deportation, and proves that during all of such period he has been and is a person of good moral character; has not been served with a final order of deportation issued pursuant to this Act in deportation proceedings up to the time of applying to the Attorney General for suspension of deportation; and is a person whose deportation would, in the opinion of the Attorney General, result in exceptional and extremely unusual hardship to the alien or to his spouse, parents, or child, who is a citizen or an alien lawfully admitted for permanent residence.

(b) Upon application by any alien who is found by the Attorney General to meet the requirements of paragraph (1), (2), or (3) of subsection (a) of this section, the Attorney General may in his discretion suspend deportation of such alien. If the deportation of any alien is suspended under the provisions of this subsection, a complete and detailed statement of the facts and pertinent provisions of law in the case, shall be reported to the Congress with the reasons for such suspension. Such reports shall be submitted on the first and fifteenth day of each calendar month in which Congress is in session. If during the session of the Congress at which a case is reported, or prior

to the close of the session of the Congress next following the session at which a case is reported, either the senate or the House of Representatives passes a resolution stating in substance that it does not favor the suspension of such deportation, the Attorney General shall thereupon deport such alien or authorize the alien's voluntary departure at his own expense under the order of deportation in the manner provided by law. If neither the Senate nor the House of Representatives shall, within the time above specified, pass such a resolution, the Attorney General shall cancel deportation proceedings. The provisions of this subsection relating to the granting of suspension of deportation shall not be applicable to any alien who is a native of any country contiguous to the United States or of any adjacent island, unless he establishes to the satisfaction of the Attorney General that he is ineligible to obtain a nonquota immigrant visa.

(c) Upon application by any alien who is found by the Attorney General to meet the requirements of paragraph (4) or (5) of subsection (a) of this section, the Attorney General may in his discretion suspend deportation of such alien. If the deportation of any alien is suspended under the provisions of this subsection, a complete and detailed statement of the facts and pertinent provisions of law in the case shall be reported to the Congress with the reasons for such suspension. Such reports shall be submitted on the first and fifteenth day of each calendar month in which Congress is in session. If during the session of the Congress at which a case is reported, or, prior to the close of the session of the Congress next following the session at which a case is reported, the Congress passes a concurrent resolution stating in substance that it favors the suspension of such deportation, the Attorney General shall cancel deportation proceedings. If within the time above specified the Congress does not pass such a concurrent resolution, or if either the

Senate or House of Representatives passes a resolution stating in substance that it does not favor the suspension of the deportation of such alien, the Attorney General shall thereupon deport such alien in the manner provided by law.

(d) Upon the cancellation of deportation in the case of any alien under this section, the Attorney General shall record the alien's lawful admission for permanent residence as of the date the cancellation of deportation of such alien is made, and the Secretary of State shall, if the alien was classifiable as a quota immigrant at the time of entry and was not charged to the appropriate quota, reduce by one the quota of the quota area to which the alien is chargeable under section 202 for the fiscal year then current at the time of cancellation or the next following year in which a quota is available. No quota shall be so reduced by more than 50 per centum in any fiscal year.

(e) The Attorney General may, in his discretion, permit any alien under deportation proceedings, other than an alien within the provisions of paragraph (4), (5), (6), (7), (11), (12), (14), (15), (16), (17), or (18) of section 241 (a), (and also any alien within the purview of such paragraphs if he is also within the provisions of paragraph (4) or (5) of subsection (a) of this section), to depart voluntarily from the United States at his own expense in lieu of deportation if such alien shall establish to the satisfaction of the Attorney General that he is, and has been, a person of good moral character for at least five years immediately preceding his application for voluntary departure under this subsection.

3. Section 244 of the same Act, as amended by Public Law 87-885, approved October 24, 1962, § 4, 76 Stat. 1247 (8 U.S.C. [1958 ed., Supp. IV] 1254), now provides:

SEC. 244. (a) As hereinafter prescribed in this section, the Attorney General may, in his discretion, suspend deportation and adjust the status to that of an alien lawfully admitted for permanent residence, in the case of an alien who applies to the Attorney General for suspension of deportation and—

(1) is deportable under any law of the United States except the provisions specified in paragraph (2) of this subsection; has been physically present in the United States for a continuous period of not less than seven years immediately preceding the date of such application, and proves that during all of such period he was and is a person of good moral character; and is a person whose deportation would, in the opinion of the Attorney General, result in extreme hardship to the alien or to his spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence; or

(2) is deportable under paragraphs (4), (5), (6), (7), (11), (12), (14), (15), (16), (17), or (18) of section 241(a); has been physically present in the United States for a continuous period of not less than ten years immediately following the commission of an act, or the assumption of a status, constituting a ground for deportation, and proves that during all of such period he has been and is a person of good moral character; and is a person whose deportation would, in the opinion of the Attorney General, result in exceptional and extremely unusual hardship to the alien or to his spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence.

(b) The requirement of continuous physical presence in the United States specified in paragraphs (1) and (2) of subsection (a) of this section shall not be applicable to an alien who (A) has served for a minimum period of twenty-four months in an active-duty

status in the Armed Forces of the United States and, if separated from such service, was separated under honorable conditions, and (B) at the time of his enlistment or induction was in the United States.

(c)(1) Upon application by any alien who is found by the Attorney General to meet the requirements of subsection (a) of this section the Attorney General may in his discretion suspend deportation of such alien. If the deportation of any alien is suspended under the provisions of this subsection, a complete and detailed statement of the facts and pertinent provisions of law in the case shall be reported to the Congress with the reasons for such suspension. Such reports shall be submitted on the first day of each calendar month in which Congress is in session.

(2) In the case of an alien specified in paragraph (1) of subsection (a) of this section—if during the session of the Congress at which a case is reported, or prior to the close of the session of the Congress next following the session at which a case is reported, either the Senate or the House of Representatives passes a resolution stating in substance that it does not favor the suspension of such deportation, the Attorney General shall thereupon deport such alien or authorize the alien's voluntary departure at his own expense under the order of deportation in the manner provided by law. If, within the time above specified, neither the Senate nor the House of Representatives shall pass such a resolution, the Attorney General shall cancel deportation proceedings.

(3) In the case of an alien specified in paragraph (2) of subsection (a) of this section—if during the session of the Congress at which a case is reported, or prior to the close of the session of the Congress next following the session at which a case is reported, the Congress passes a concurrent resolution stating in substance that it favors the suspension of such deportation,

the Attorney General shall cancel deportation proceedings. If within the time above specified the Congress does not pass such a concurrent resolution, or if either the Senate or the House of Representatives passes a resolution stating in substance that it does not favor the suspension of the deportation of such alien, the Attorney General shall thereupon deport such alien in the manner provided by law.

(d) Upon the cancellation of deportation in the case of any alien under this section, the Attorney General shall record the alien's lawful admission for permanent residence as of the date the cancellation of deportation of such alien is made, and the Secretary of State shall, if the alien was classifiable as a quota immigrant at the time of entry and was not charged to the appropriate quota, reduce by one the quota of the quota to which the alien is chargeable under section 202 for the fiscal year then current at the time of cancellation or the next following year in which a quota is available. No quota shall be so reduced by more than 50 per centum in any fiscal year.

(e) The Attorney General may, in his discretion, permit any alien under deportation proceedings, other than an alien within the provisions of paragraphs (4), (5), (6), (7), (11), (12), (14), (15), (16), (17), or (18) of section 241 (a) (and also any alien within the purview of such paragraphs if he is also within the provisions of paragraph (2) of subsection (a) of this section), to depart voluntarily from the United States at his own expense in lieu of deportation if such alien shall establish to the satisfaction of the Attorney General that he is, and has been, a person of good moral character for at least five years immediately preceding his application for voluntary departure under this subsection.

(f) No provision of this section shall be applicable to an alien who (1) entered the United States as

a crewman; or (2) was admitted to the United States pursuant to section 101(a)(15)(J) or has acquired such status after admission to the United States; or (3) is a native of any country contiguous to the United States or of any adjacent island named in section 101(b)(5): *Provided*, That the Attorney General may in his discretion agree to the granting of suspension of deportation to an alien specified in clause (3) of this subsection if such alien establishes to the satisfaction of the Attorney General that he is ineligible to obtain a nonquota immigrant visa.

4. Section 265 of the Immigration and Nationality Act, 8 U.S.C. 1305, provides:

§1305. Change of address

Every alien required to be registered under this subchapter, or who was required to be registered under the Alien Registration Act, 1940, as amended, who is within the United States on the first day of January following the effective date of this chapter or on the first day of January of each succeeding year shall, within thirty days following such dates, notify the Attorney General in writing of his current address and furnish such additional information as may by regulations be required by the Attorney General. Any such alien shall likewise notify the Attorney General in writing of each change of address and new address within ten days from the date of such change. Any such alien who is temporarily absent from the United States on the first day of January following the effective date of this chapter, or on the first day of January of any succeeding year shall furnish his current address and other information as required by this sec-

tion within ten days after his return. Any such alien in the United States in a lawful temporary residence status shall in like manner also notify the Attorney General in writing of his address at the expiration of each three-month period during which he remains in the United States regardless of whether there has been any change of address. In the case of an alien for whom a parent or legal guardian is required to apply for registration, the notice required by this section shall be given by such parent or legal guardian. June 27, 1952, c. 477, Title II, ch. 7, §265, 66 Stat. 225.

In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 865

ATHANASIOS PATSIS a/k/a THOMAS NICKAS,
PETITIONER

v.

IMMIGRATION & NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

We respectfully invite the attention of the Court to the following facts which show that the petition was filed out of time:

The judgment of the court of appeals was entered on October 29, 1964. (Pet. 2; Record, Volume 2, p. 19). The petition for a writ of certiorari was filed on January 29, 1965, ninety-two days later.

Section 2101(c) of Title 28 of the United States Code provides that "any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree." Since these limits are jurisdictional, the petition should be dismissed as untimely.

Respectfully submitted,

ARCHIBALD COX,
Solicitor General.

MARCH 1965.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964

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ATHANASIOS PATSIS a/k/a THOMAS NICKAS,
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vs.

IMMIGRATION & NATURALIZATION SERVICE.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

MEMORANDUM FOR THE PETITIONER IN REPLY

ALBERT J. YONKE,
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E. L. MANDERBACH, INC., 1108 Oak Street, Kansas City, Mo. 64106, HArrison 1-3030

INDEX

TABLE OF CONTENTS

Argument 1

Conclusion 4

TABLE OF AUTHORITIES

Cases

C.I.R. v. *Bedford's Estate*, 325 U.S. 283, 285 (1945) 3

Costello v. *Immigration & Naturalization Service*, 375 U.S. 120, 128 (1964) 4

The Providence Rubber Co. v. *Charles Goodyear*, 6 Wall. 153, 18 L. Ed. 762 (1868) 3

TABLE OF CONTENTS OF APPENDIX

Letter from Clerk of the Eighth Circuit Court dated March 15, 1965 (Exhibit No. 1) A1

Letter from Herbert J. Miller, Jr., Criminal Division, Department of Justice, dated November 6, 1964 (Exhibit No. 2) A3

Order of the United States Court of Appeals for the Eighth Circuit dated January 5, 1965 (Exhibit No. 3) A5

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964

No. 865

ATHANASIOS PATSIS a/k/a THOMAS NICKAS,
Petitioner,

vs.

IMMIGRATION & NATURALIZATION SERVICE.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

MEMORANDUM FOR THE PETITIONER IN REPLY

ARGUMENT

The Court's attention is respectfully invited to the following facts which show that the petition was not filed out of time. These facts are contained in a letter from Robert C. Tucker, Clerk of the United States Court of Appeals for the Eighth Circuit, dated March 15, 1965 and received by counsel for petitioner on March 16, 1965. (That letter is printed as Exhibit No. 1 and is set forth in full in the Appendix attached to this memorandum. The original

of that letter is being sent to the Court under separate cover.)

That letter reveals that the decree in this cause was not prepared until about November 9, 1964. Although decree was then *entered as of* October 29, 1964, it is apparent that the decree could not have been actually physically entered on October 29, 1964. When the decree was prepared on about November 9, 1964, the date of October 29, 1964, had passed. The decree was simply antedated for the date of October 29, 1964.

An examination of the Rules of the United States Court of Appeals for the Eighth Circuit, effective as of March 1, 1959, does not reveal the existence of authority to antedate a decree. Rule 14 (b) of the Eighth Circuit provides:

> "When an opinion has been filed with the clerk, he shall, unless otherwise directed by the court or by the judge who prepared the opinion, enter the judgment or decree required by the opinion, without submitting the form of judgment or decree to the court or to a member thereof for approval, and such judgment or decree, when so entered in conformity with the opinion, shall be the judgment and decree of the court."

Rule 14 (b) does not authorize the Clerk of the Eighth Circuit to antedate the judgment or decree for the date of the filing of the opinion.

As the Clerk's letter of March 15, 1965, points out, the Clerk of the Eighth Circuit and counsel for the government were, as late as November 6, 1964, controverting the issue as to whether the government had to prepare the decree in this case in conformity with Rule 27 (1) of the Eighth Circuit. On either November 7th or 9th, 1964, counsel for petitioner received a copy of the letter from the government to the Clerk of the Eighth Circuit in which

the government argued that Rule 27 (1) was not applicable. (That copy of the November 6, 1964, letter is printed as Exhibit No. 2 and is set forth in full in the Appendix attached to this memorandum. The original copy of that letter is being sent to the Court under separate cover.)

There is no doubt that an opinion and a decree are distinguishable. This Court held in *C.I.R. v. Bedford's Estate*, 325 U.S. 283, 285 (1945), that the commencement date, for computing the time within which a writ of certiorari should be filed, should begin from the date of judgment or decree and not from entry date of the opinion, even though the opinion contained words of enforcement similar to the language of a judgment or decree. In case of *The Providence Rubber Co. v. Charles Goodyear*, 6 Wall. 153, 18 L. Ed. 762 (1868), it was held that where a decree stated it was *entered as of* November 28, 1866, but was not actually entered until December 5, 1866, the date of December 5th would be used for computation of the applicable time limit for an appeal.

Petitioner contends that the entry date of the decree in this case should be November 9, 1964. It was on this date when the decree, after being prepared, was actually entered. As stated above, no authority exists for antedating the entry date of the decree.

Petitioner contends he should not be penalized for error existing in the minds of his counsel caused by an apparent confusion as to actual entry date of the decree. In this regard it must be pointed out that the Eighth Circuit granted petitioner a stay of mandate in this case until February 1, 1965. If October 29, 1964, is interpreted to be the entry date of the decree in this case, it must be noted that the mandate was therefore stayed for 95 days. (That order is printed as Exhibit No. 3 and is set forth in full in

the Appendix attached to this memorandum. The original copy is being sent to the Court under separate cover.)

This Court in *Costello* v. *Immigration & Naturalization Service*, 376 U.S. 120, 128 (1964), has characterized deportation "as a drastic measure and at times the equivalent of banishment or exile". Petitioner in this cause is faced with such drastic measures. In these circumstances, it is submitted that this cause should be decided on its merits, especially where respondent has only opposed certiorari for the reason that the petition was filed out of time. The government apparently does not oppose petitioner's writ on any other ground.

CONCLUSION

For the reasons submitted, petitioner respectfully requests that the Petition for Writ of Certiorari be granted.

Respectfully submitted,

ALBERT J. YONKE,
HARRY D. PENER,
Counsel for Petitioner.

EXHIBIT No. 1

Letter from Clerk of the Eighth Circuit Court
Dated March 15, 1965

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

St. Louis, Mo. 63101

Robert C. Tucker, Clerk

March 15, 1965

Mr. Albert J. Yonke
Yonke and Shackelford
1422 Professional Building
1103 Grand Avenue
Kansas City, Missouri

Re: No. 17316. Athanasios Patsis, etc. v. Immigration and Naturalization Service.

Dear Sir:

With reference to the above styled cause in this Court, Mr. Pener of your office called me last week. The Court was sitting here in St. Louis at the time I took Mr. Pener's call and I am afraid that due to the pressure of the session, I was unable to give the matter about which Mr. Pener inquired my complete attention and may have, in fact, misadvised him.

The facts about which Mr. Pener made inquiry are as follows: The Court's printed opinion was filed October 29, 1964, and all counsel were notified of the filing of the opinion on that date. In our letter to counsel for the government advising of the filing of the opinion, we requested counsel to prepare the decree in this case in accordance with our Rule 27(1). In a letter dated November 6, 1964, counsel for the government took the position that the filing of a decree under our Rule 27(1) was inappropriate. We

thereupon prepared a decree in this office in conformity with the Court's opinion of October 29. That decree is dated and filed as of October 29 in accordance with our usual practice although I am certain that it was actually physically prepared on a date later than that, probably about November 9, 1964.

On November 13, 1964, we received a motion to stay the mandate in this case from you and a request for transcript of the proceedings in this Court for use in the Supreme Court of the United States in connection with an application for writ of certiorari. On that date we sent you a letter stating that an order had been entered staying the mandate of this Court and enclosed a copy of the Court's decree in this case bearing the date of October 29, 1964.

Very truly yours,

/s/ Robert C. Tucker
Robert C. Tucker
Clerk

RCT:lp
CC Mr. Don C. Bennett
Mr. Herbert J. Miller

EXHIBIT No. 2

Letter from Herbert J. Miller, Jr., Criminal Division, Department of Justice, Dated November 6, 1964

HJM:DRB:ns
39-43-25

November 6, 1964

AIR MAIL

Mr. Robert C. Tucker
Clerk
United States Court of Appeals
For the Eighth Circuit
St. Louis, Missouri

Re: Athanasios Patsis v. Immigration and Naturalization Service
C. A. No. 17316

Dear Mr Tucker:

This will acknowledge receipt of your letter dated October 29, 1964, enclosing a copy of the opinion filed in subject case.

Your letter indicates that the Government should, in accordance with Rule 27(1) of the Eighth Circuit, prepare a decree for the Court asking for enforcement of the administrative order involved in the instant case. We note, however, that the decree called for by Rule 27(1) is applicable to the type of action for judicial review outlined in Rule 27(c)—namely, where the Government has filed "[a]n application for enforcement of an order of an administrative agency, board, commission or officer . . ."

The instant action was precipitated not by the Government but rather by Patsis who, in accordance with Section 106 of the Immigration and Nationality Act of 1952 (8

U.S.C. Supp. V (1959-1963) 1105a), filed "a petition for review" of a final order of deportation made against him, 8 U.S.C. 1105a(a)(1). The Immigration and Naturalization Service, not Patsis, was the respondent in subject case, 8 U.S.C. 1105a(a)(3). In this respect see your Rule 27(1), wherein it is provided that the "agency, board, commission or officer concerned shall within ten days serve upon the respondent" a copy of the proposed decree. Since the Service is the respondent in this case, we do not believe that the filing of the type of decree contemplated by Rule 27(1) would be appropriate.

cc: Mr. Albert J. Yonke

Subject case is, to our knowledge, the first one decided by the Eighth Circuit under 8 U.S.C. 1105a. There have, however, been numerous such cases decided in several of the other Circuits, and judging from the opinion in those cases it appears to be the practice to enter an order dismissing the petition for review or an order sustaining the administrative final order of deportation. See, e. g., *Holz* v. *Immigration and Naturalization Service*, 309 F.2d 452, 454 (C.A. 9); *Talavera* v. *Pederson*, 334 F.2d 52, 58 (C.A. 6); *D'andrea* v. *Immigration and Naturalization Service*, 335 F.2d 377, 378 (C.A. 6); *Samala* v. *Immigration and Naturalization Service*, 336 F.2d 7, 13 (C.A. 5).

Sincerely,

HERBERT J. MILLER, JR.
Assistant Attorney General
Criminal Division

By:
HAROLD P. SHAPIRO, Chief
Administrative Regulations Section

EXHIBIT No. 3

Order of the United States Court of Appeals for the Eighth Circuit Dated January 5. 1965

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 17316 September Term, 1964

Athanasios Patsis a/k/a Thomas Nickas,
Petitioner,
vs.
Immigration & Naturalization Service.

On Petition for Review of Order of Board of Immigration Appeals

On motion of counsel for petitioner, it is now here ordered that the stay of a certified copy of the decree of this Court previously entered in this cause be, and is hereby, extended to and including February 1, 1965.

If within this period of time there is filed with the Clerk of this Court a certificate of the Clerk of the Supreme Court of the United States that a petition for writ of certiorari and record have been filed, the stay hereby granted shall continue until the final disposition of this case by the Supreme Court.

January 5, 1965.

Office Supreme Court, U.S.
FILED
APR 22 1965
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964

No. 865

ATHANASIOS PATSIS a/k/a/ THOMAS NICKAS,
Petitioner

vs.

IMMIGRATION & NATURALIZATION SERVICE.

PETITION FOR REHEARING

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

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ARGUMENT

Petitioner contends that this petition for rehearing should be granted on his petition for writ of certiorari so that the irreconcilable conflict as to the proper interpretation to be given Section 244(a)(5), 8 U.S.C. §1254(a)(5) can be resolved by the decision of this Court.

It is apparent that the decisions of the Eighth Circuit in *Patsis* v. *Immigration and Naturalization Service*, 337

F.2d 733 (8th Cir. 1964) and the Ninth Circuit in *Fong* v. *Immigration and Naturalization Service*, 308 F.2d 191 (9th Cir. 1962), are in conflict. Their approach as to the proper interpretation of Section 244(a)(5) is distinctly different. In *Patsis* the Eighth Circuit held that a violation of Section 265, 8 U.S.C. §1305, would destroy an otherwise acceptable ten-year period of good character as required by Section 244(a)(5). On page 195 of its opinion in *Fong* the Ninth Circuit held a violation of Section 265 to be "only a minor infraction".

On pages 26 and 27 of its brief in the Eighth Circuit, in *Patsis*, the Immigration and Naturalization Service could not find *Fong* to be distinguishable, but instead it argued that the decision should be rejected. In other words, in its brief urging the result ultimately reached by the Eighth Circuit in *Patsis*, the Service, itself, at the outset, realized that *Fong* would be in conflict. In part, the Service argued on pages 26 and 27:

> ". . . there is, however, support for the position that the 10-year residence requirement in Section 244(a)(5) could be computed from the date an alien first committed an act or assumed a status for which he was deportable even though it was not within the paragraphs of Section 241(a) enumerated in Section 244(a)(5). *Louie King Fong* v. *Immigration and Naturalization Service*, 308 F.2d 191 (C.A. 9). There, the alien was ordered deported solely for failure to furnish annual address reports as required by Section 265 of the Act, 8 U.S.C. 1305. However, the alien could have been found deportable under Section 241(a)(2) for illegally remaining in the United States in 1944 or for accepting unauthorized employment in that year. The Ninth Circuit held that the 10-year period could be computed from the date of the commission in 1944 of the first deportable act. We see no basis for distinguishing this case from *Fong* merely because this case involves Section 241(a)(1) and *Fong* involved Sec-

tion 241(a)(2). Accordingly, under the *Fong* doctrine, petitioner would have met the 10-year residence requirement of Section 244(a)(5) as it read before it was amended in 1963.

"However, the *Fong* approach should be rejected."

Petitioner submits that if this petition for rehearing is denied, Congress will be held to have intended to have enacted meaningless legislation. It is apparent that an alien under the *Patsis* doctrine can never meet the 10-year good character requirement of Section 244(a)(5) due to the requirement of Section 265. As soon as he complies with Section 265 (during that 10-year period) his 10-year good character period would, for practical purposes, be ended. He would be deported.

The *Fong* approach, however, would compute the 10-year period of Section 244(a)(5) from the date of an assumption of any deportable status. By way of dictum the Court in *Tibke* v. *Immigration and Naturalization Service*, 335 F.2d 42, 47 (2nd Cir. 1964), would seem to adopt the *Fong* treatment of Section 244(a)(5).

It is also urged that the question involved here, and the attendant conflict of decisions on that question, is not made moot by the enactment of Section 4 of the Act of October 24, 1962, 76 Stat. 1247. It is arguable that Section 4, which made the provisions of Section 244(a)(5) inapplicable to a crewman, should not be made to operate retroactively. This Court in *Foti* v. *Immigration and Naturalization Service*, 375 U.S. 217 (1963) held that it was at least still arguable whether the amendment of Section 244(a)(5) made moot the jurisdictional issue involved there. On page 221, footnote 4, this Court stated:

"On October 24, 1962 subsequent to the decision below and while the case was pending before this court, on

petition for certiorari, Congress enacted Public Law 87-885, §4, 76 Stat. 1247, effective the same date. This enactment provides, in relevant part, for the amendment of §244 of the Act, the source of the Attorney General's power to suspend the deportation of eligible classes of aliens, by the addition of a new subsection, which states: 'No provision of this section shall be applicable to an alien who (1) entered the United States as a crewman. . . .' Although petitioner concededly entered the United States as a crewman, and the Government has indicated that, when the merits of this are reached, it will argue that petitioner is now absolutely ineligible for the relief sought, because of the 1962 amendment to §244, we agree with the parties that the enactment of this amendment did not necessarily have the effect of rendering moot the jurisdictional issue involved in this litigation. The applicability of this provision to and in petitioner's situation is an arguable matter, and since it is not undisputed but remains debatable whether the relief sought by petitioner could still be granted, we have determined it not improper to consider and decide the threshold question of the jurisdiction of the Court of Appeals."

In addition to this Court's ruling on the question of mootness, it must also be pointed out that the Eighth Circuit in *Patsis*, at 337 F.2d 739, assumed for the purpose of its opinion that the amendment of Section 244 was inapplicable.

CONCLUSION

For the reasons stated, petitioner respectfully prays that this petition for rehearing be granted.

Respectfully submitted,

ALBERT J. YONKE,
HARRY D. PENER,
Counsel for Petitioner.